Supreme Court, U.S.
FILED

'98 990 DEC 17 1998

OFFICE OF THE CLERK

No.:

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

Carmen Perillo, Stephen Dautel, Gerald Hardy,
William Brown, J. Elaine Broom,
and Joann Kotchkowski,
Petitioners

v.

AT&T Corp.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

Robert J. Winicki
(Counsel of Record)
Winicki Law Firm
11265 Alumni Way
Suite 201
Jacksonville, Fl. 32246
(904) 564-9955

Barbara Slott Pegg
Barbara Slott Pegg, P.A.
13000 Sawgrass Village
Circle, Suite 11
Ponte Vedra, Fl. 32082
(904) 285-8100

Attorneys for Petitioners

25 pp

QUESTION PRESENTED FOR REVIEW

Is Local Rule 4.04(e) of the United States District Court for the Middle District of Florida, which prohibits all communications by named representative class plaintiffs and their counsel relating to the action with potential or actual class members, a prior restraint on speech and assembly in facial violation of the First Amendment to the United States Constitution?

PARTIES TO THE PROCEEDING

The petitioners are Carmen Perillo, Stephen Dautel, Gerald Hardy, William Brown, J. Elaine Broom and Joann Kotchkowski.

The respondent is AT&T Corp. ("AT&T"), which is a publicly traded corporation that is a parent to a number of subsidiaries, some or all of which are wholly owned.

TABLE OF CONTENTS

TABLE OF AUTHORITIES 4

STATEMENT OF JURISDICTIONAL GROUNDS 5

CONSTITUTIONAL PROVISIONS AND RULES 5

STATEMENT OF THE CASE 6

REASONS TO GRANT THE WRIT OF CERTIORARI ... 11

A. Local Rule 4.04(e) Conflicts with this Court's Opinion in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) 11

B. The Eleventh Circuit's Most Recent Application of Local Rule 4.04(e) Conflicts with this Court's Opinion in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981) 13

C. Local Rule 4.04(e) and its Most Recent Application by the Eleventh Circuit Conflicts with Decisions of the United States Courts of Appeals for the Sixth and Eighth Circuits 18

CONCLUSION 20

APPENDIX 22

TABLE OF AUTHORITIES

Cases

Bernard v. Gulf Oil Co., 619 F.2d 459 (1980) (en banc), *aff'd on other grounds*, 452 U.S. 89 (1981) ..... passim

Gulf Oil Co. v. Bernard, 452 U.S. 89 (1981)..... passim

H.B.A. Management, Inc. v. Estate of Schwartz By and Through Schwartz, 693 So.2d 541 (Fla. 1997)..... 17

Hoffmann-La Roche Inc. v. Sperling, 493 U.S. 165 (1989)..... 20

Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999 (11th Cir. 1997) 16, 17

McKenna v. Champion International Corp, 747 F.2d 1211 (8th Cir. 1984) 19, 20

Williams v. United States District Court, 658 F.2d 430 (6th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981).... 18, 19

Statutes

Section 1331 of Title 28 of the United States Code..... 7

Section 2101(e) of Title 28 of the United States Code 5

Rules

Local Rule 4.04(e) of the United States District Court for the Middle District of Florida ..... passim

Rule 23 of the Federal Rules of Civil Procedure . 6, 12, 14, 15

OPINIONS BELOW

On September 22, 1998, the United States Court of Appeals for the Eleventh Circuit denied petitioners' petition for a writ of prohibition to the United States District Court for the Middle District of Florida in an unpublished order. A copy of the order is contained in the Appendix (App. A.).

On August 12, 1998, the United States District Court for the Middle District of Florida denied petitioners' motion to declare Local Rule 4.04(e) in facial violation of the right to speech and assembly and right to access to courts, without prejudice to their right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification, in an unpublished order. A copy of the order is contained in the Appendix (App. B.).

STATEMENT OF JURISDICTIONAL GROUNDS

This Court has jurisdiction under section 2101(e) of Title 28 of the United States Code to review by certiorari the denial of petitioners' petition for writ of prohibition by the United States Court of Appeals for the Eleventh Circuit on September 22, 1998.

CONSTITUTIONAL PROVISIONS AND RULES

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peacefully to

assemble, and to petition the Government for a redress of grievances."

Local Rule 4.04(e) of the United States District Court for the Middle District of Florida provides: "In every case sought to be maintained by any party as a class action, all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member, not a formal party to the case, without approval by order of the Court. The communications forbidden by this rule include, but are not limited to, (1) solicitations directly or indirectly of legal representation of actual or potential class members who are not formal parties to the case; (2) solicitations of fees and expenses, or agreements to pay fees or expenses, from actual or potential class members who are not formal parties to the case; and (3) solicitations of requests by class members to opt out in class actions under Rule 23(b)(3), Fed. R. Civ. P."

STATEMENT OF THE CASE

On June 16, 1996, a class action complaint was filed in the United States District Court for the Middle District of Florida by the above-named six petitioners, plaintiffs below, on behalf of individuals who were salaried management employees for a number of years of: (1) AT&T Solutions Customer Care, Inc. ("AT&T Solutions Customer Care"), a subsidiary of AT&T Corp. ("AT&T"), prior to its acquisition by MATRIXX Marketing, Inc. ("Matrixx"): and (2) AT&T Universal Card Services, Inc., a subsidiary of AT&T, ("Universal Card Services"), prior to its acquisition by Citibank, N.A.. The case being heard in the district court below involves whether AT&T violated ERISA by purposely

interfering with the petitioners' attainment of ERISA benefits including those offered when AT&T adopted an early retirement program called the Voluntary Retirement Incentive Program ("VRIP"), commonly known as the Armstrong Plan. The class sought to be represented are all former managers of two former AT&T subsidiaries, AT&T Solutions Customer Care and Universal Card Services, with whose attainment of ERISA benefits AT&T purposely interfered.

The basis of jurisdiction in the United States District Court for the Middle District of Florida was federal question under section 1331 of Title 28 of the United States Code.

The Middle District of Florida's Local Rule 4.04(e) prohibits communications by the six named plaintiffs and their counsel with any actual or potential class members concerning the litigation.

The six named plaintiffs and their counsel have been prohibited from communicating with other former managers of AT&T Solutions Customer Care and Universal Card Services since the date this action was filed because of Local Rule 4.04(e). On June 29, 1998, the named plaintiffs filed an emergency motion with the district court, Judge Harvey Schlesinger, to declare Local Rule 4.04(e) in violation of the rights to speech and assembly under the First Amendment of the United States Constitution.

In addition to the six named plaintiffs, many other former AT&T Solutions and Universal Card Services managers have made contributions to defray the legal costs of performing the necessary research prior to bringing the district court litigation. All of these former managers are potential class members. In addition, many had indicated that they desired to continue to financially support the

litigation through contributions necessary to pay ongoing costs. They also desire to be kept informed of the progress of the case and to provide relevant information to petitioners' counsel. For various reasons, many of the former managers of AT&T Solutions Customer Care and Universal Card Services did not desire to be named plaintiffs, but still desired to remain involved. Yet, all communications ceased as of the date the complaint was filed. Absolutely no justification for this arbitrary ban on all communications has been given by the district court judge, the United States Court for the Middle District of Florida, the United States Court of Appeals for the Eleventh Circuit or by AT&T.

Although the petitioners, named plaintiffs below, and their counsel were able to communicate with the other former managers immediately prior to the complaint being filed, after the complaint was filed Local Rule 4.04(e) prohibited communication between the named plaintiffs and their counsel; and the former managers who are not named plaintiffs. For example, because of Local Rule 4.04(e) the former managers cannot be told that the lawsuit was filed, despite their contribution to the filing fee. Nor could the former managers be told that a petition was being filed with the United States Court of Appeals for the Eleventh Circuit to declare the Local Rule 4.04(e) unconstitutional, despite the fact that their contributions are paying part of the filing fee. The same is true for this petition to the United States Supreme Court.

The complete prohibition of communication between the named plaintiffs and their counsel with the former managers affects other critical events of this lawsuit. In particular, Matrixx has been communicating with its managerial employees formerly employed with AT&T Solutions Customer Care about releasing their bridging rights under the Mandatory Portability Agreement, which applies to

AT&T and Matrixx, and about a reduction in force. Certain of the named plaintiffs and other management employees formerly employed with AT&T Solutions Customer Care have been presented with a proposal to waive their rights under the Mandatory Portability Agreement, which provides for mutual recognition of service credit and transfer of benefit obligations for certain employees who leave one "Interchange Company" and are later employed by another "Interchange Company." Interchange Companies include AT&T, the RBOCs (i.e., BellSouth) and Cincinnati Bell, Inc., the parent of Matrixx. The proposed release included, in part, the following language:

> Any and all claims for benefits arising under the Employment Retirement Income Safety [Security] Act ("ERISA"), as amended from time to time, of any sort relating to portability of service with my former, current or future portability employer(s) [or Interchange Companies and certain of their subsidiaries].

Despite this critical event affecting the former managers, including events with deadlines that may impact their rights under this lawsuit, the named plaintiffs and their counsel cannot respond, advise or communicate with the former managers because they are potential class members. All such communications are barred by Local Rule 4.04(e).

Counsel in this case, as well as in other class actions pending in the Middle District of Florida, are frequently questioned as to why the counsel in Florida state courts and other federal district courts, including the Northern and Southern Districts of Florida, are able to freely communicate relevant class information with actual and potential class members, including over the internet, utilize e-mail and toll-

free numbers, but counsel in the Middle District of Florida cannot even tell an individual, who paid part of the filing fee, that the complaint was filed. The answer given is because the Middle District of Florida has completely banned such communications and that motions seeking to lift the ban are routinely denied, as was true in this case.

On June 29, 1998, petitioners filed a Motion to Declare Local Rule 4.04(e) in Facial Violation of the Right to Speech and Assembly. The motion was denied, without prejudice to Plaintiffs' right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification, by order filed August 12, 1998. The order of denial was one sentence on this important constitutional matter involving a prior restraint on speech and assembly. The order read in full as follows:

> Plaintiffs' Motion to Declare Local rule 4.04(e) in Facial Violation of the Right to Speech and Assembly and Right to Access to Courts (Doc. No. 4 filed June 29, 1998) is DENIED, without prejudice to Plaintiffs' right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification.

On September 7, 1998, petitioners served a petition for writ of prohibition in the United States Court of Appeals for the Eleventh Circuit. On September 22, 1998, the Eleventh Circuit issued an order that read in full: "Petitioners' petition for writ of prohibition is DENIED."

REASONS TO GRANT THE WRIT OF CERTIORARI

A. Local Rule 4.04(e) Conflicts with this Court's Opinion in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)

In *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981), this Court reviewed the question of whether an order limiting communications with potential class members was an unconstitutional prior restraint on expression entitled to First Amendment protection. The Court held that the order in question was an abuse of the discretion of the district court under the Federal Rules of Civil Procedure for the following reasons: "(a) The order is inconsistent with the general policies embodied in Federal Rule of Civil Procedure 23, which governs class actions in federal district courts . . . ; (b) . . . [S]uch an order should be based on a clear record and specific findings reflecting a weighing of the need for a limitation and the potential interference with the parties' rights . . . ; (c) . . . The fact that the order involved serious restraints on expression, at a minimum, counsels caution on the District Court's part in drafting the order and attention to whether the restraint was justified by a likelihood of serious abuses . . . ; (d) The mere possibility of abuses in class-action litigation does not justify routine adoption of a communications ban that interferes with the formation of a class or the prosecution of a class action in accordance with the Federal Rules." *Id.* at 90.

The Court acknowledged that although class actions may present "opportunities for abuse as well as problems for courts and counsel in the management of cases, . . . a district court has both the duty and the broad authority to exercise control over a class action to enter appropriate orders governing the conduct of counsel and parties. But this discretion is not unlimited, and indeed is bounded by the

relevant provisions of the Federal Rules. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974). Moreover, . . . exercises of this discretion are subject to appellate review. (cite omitted) *see Eisen; Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340 (1978)." *Id.* at 100.

Furthermore, the Court rejected the district court's imposition of sweeping limitations on communications by named plaintiffs and their counsel to prospective class members and required that "an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. (footnote omitted) *Id.* at 101. The Court reasoned: "Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing -- identifying the potential abuses being addressed -- *should result in a carefully drawn order that limits speech as little as possible*, consistent with the rights of the parties under the circumstances." *Id.* at 101-02 (emphasis added) (footnote omitted).

> [T]o the extent that the district court is empowered ... to restrict certain communications in order to prevent frustration of the policies of Rule 23, *it may not exercise the power without a specific record showing by the moving party of the particular abuses by which it is threatened.* Moreover, the district court must find that the showing provides a satisfactory basis for relief and that the relief sought would be consistent with the policies of Rule 23 giving explicit

> consideration to the narrowest possible relief which would protect the respective parties.

Gulf Oil Co. v. Bernard, 452 U.S. at 102 (emphasis added).

No one, including the district court judge, the Middle District of Florida and AT&T, ever attempted to make such a showing. Instead, Local Rule 4.04(e), in direct contravention to the emphasized holding of this Court, imposes a complete ban without a motion or showing by anyone. AT&T's response to the petitioners' emergency motion argued that motion should be denied because the plaintiffs "failed to demonstrate a compelling need for communications with the class." AT&T and the Middle District of Florida, with the acquiescence of the Eleventh Circuit, have shifted the burden to petitioners to demonstrate a "compelling need" for communication, exactly the opposite of the burden imposed by the Supreme Court in *Gulf Oil Co. v. Bernard*. The district court's ruling is no better. A one-line order continuing the complete prohibition does nothing to meet the mandate of the Court for "*a specific record showing by the moving party of the particular abuses by which it is threatened*."

B. The Eleventh Circuit's Most Recent Application of Local Rule 4.04(e) Conflicts with this Court's Opinion in *Gulf Oil Co. v. Bernard*, 452 U.S. 89 (1981)

In the lower court decision of the en banc United States Court of Appeals for the Fifth Circuit in *Bernard v. Gulf Oil Co.*, 619 F.2d 459 (1980) (en banc), *aff'd on other grounds*, 452 U.S. 89 (1981), the pre-split Fifth Circuit had decided the constitutionality under the First Amendment of the district court's temporary order, which broadly restricted communication by parties and their counsel with actual and

potential class members. The temporary order in *Bernard v. Gulf Oil Co.* limited communication by parties and their counsel with actual or potential class members of a racial discrimination lawsuit. Despite the order being imposed on parties to a class action governed by Rule 23 of the Federal Rules of Civil Procedure, the Fifth Circuit held that the order entered in the case was an unconstitutional prior restraint. The court reasoned that "[a] prior restraint is generally judicial rather than legislative in origin, although an enabling statute may authorize the judicial suppression of publication. *Near v. Minnesota*, [283 U.S. 697 (1931)]. The essence of prior restraint is that it places specific communications under the personal censorship of the judge. Kalven, Foreward: Even When a Nation is at War, 85 Harv.L.Rev. 3, 33 (1971)." *Bernard v. Gulf Oil Co.*, 619 F.2d at 467-68.

There was an exception to the order at issue in the *Bernard* case that permitted communication between attorney and client, and between attorney and prospective client if on the initiative of a client or the prospective client. Despite the exception, the appellate court remarked unfavorably to the fact that in *Bernard's* order the present client was forbidden to talk to the prospective client. *See id.* at 470, n. 16.

Yet, the exception provided in the *Bernard* order was less restrictive that what is prohibited by the Local Rule 4.04(e), which unjustly forbids counsel from talking to former managers who already have contributed to the lawsuit and/or attended initial meetings with counsel and named plaintiffs, who have established an attorney/client relationship.

The en banc Fifth Circuit rejected any exception under the Federal Rules of Civil Procedure governing class actions, for "permitting prior restraints merely because it arises in the general context of the administration of justice

and the particular context of Rule 23." *Id.* at 474. The court continued:

> The validity of a prior restraint entered under Rule 23 must be tested by the same standards utilized in other contacts. Subdivision (d) of Rule 23, which authorizes the court, in its discretion, to make appropriate orders in class actions, was designed to further 'the fair and efficient conduct of the action . . . .' [T]he court's discretion under Rule 23 is a facet of its general authority to regulate the conduct of litigation. To the extent that Rule 23 implements the class action as a unique litigation device, that discretion may be correspondingly broadened, and we recognize broad management powers of the court under Rule 23. But, while a legislative enactment may alter the court's authority under common law, it may not encroach upon constitutionally protected rights. Prior restraints are no less suspect in a statutory setting than they are in a constitutional context. *Allen v. Monger*, 583 F.2d 438, 442 (9th Cir. 1978), *pet. for cert. filed sub nom., Brown v. Allen*, -- U.S. --, 100 S.Ct. 1003, 62 L.Ed.2d 745 (1978).

Id. at 474.

There has been only one subsequent case decided in the Eleventh Circuit concerning a similar prohibition on communication to prospective class members. Last year the Eleventh Circuit in a case that is conspicuous for the absence of any discussion of the constitutionality of Local Rule 4.04(e), Judge Tjoflat set forth a test for the district courts below to pass before issuing orders authorizing class

communications prior to class certification. *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997). (Judge Tjoflat wrote the special concurrence in the en banc *Bernard* decision in which he opined that the order should be invalidated on non-constitutional grounds because it was inadequately supported by findings of facts, a position that for the most part was approved of by the Court in its *Bernard* decision.) *Jackson* involved a class action lawsuit in which defendants filed a writ of mandamus petition to vacate an order allowing for mass mailing and 800 number communications with potential class members.

The test set forth by Judge Tjoflat is as follows:

> An order authorizing class communications prior to class certification is likely to be an abuse of discretion when (1) the communication authorized by the order is widespread and clearly injurious and (2) a certification decision is not imminent or it is unlikely that a class will in fact be certified. In such circumstances, the danger of abuse that always attends class communications--the possibility that plaintiffs might use widespread publication of their claims, disguised as class communications, to coerce defendants into settlement--is not outweighed by any need for immediate communications.

Id. at 1004.

This test of an individual communication order misses the constitutional issue of the pre-existing blanket prohibition imposed by Local Rule 4.04(e). There is no order authorizing class communication. Just the opposite is true; the Local Rule 4.04(e) prohibits all such communications.

Moreover, in *Jackson v. Motel 6 Multipurpose, Inc.*, many of the potential class members referred to were current employees of defendant, which could involve ethical implications. In this case, however, the former managers are by definition former employees of former subsidiaries of the defendant, AT&T. Communication by counsel for petitioners with former employees is expressly permitted by the Florida Code of Professional Conduct. *H.B.A. Management, Inc. v. Estate of Schwartz By and Through Schwartz*, 693 So.2d 541 (Fla. 1997). Counsel for AT&T would be in violation of Florida Rule of Professional Conduct 4-3.4(f), if they were to advise former employees not to communicate with petitioners' counsel.

To the extent Judge Tjoflat based his conclusory statement without factual findings in *Jackson* that "the advertisements and mass mailings allowed by the order at issue in the instant petition are nationwide in scope and are *surely causing serious and irreparable harm to Motel 6's reputation and to its relationship with its employees*" upon a perception of the intelligence of the audience being able to understand truthful communications, then *Jackson* is wrongly decided. First Amendment rights cannot be abridged because of a trial court's perception of the audience, which were primarily non-white receptionists, chambermaids and janitors who were employed by Motel 6 in *Jackson*. The same conclusion may be drawn by the publication of Lincoln's Emancipation Proclamation with respect to its impact on slavery, but that is not an injury that justifies a prior restraint on freedom of speech. Speeches at labor rallies by Eugene Debs may have disrupted employer-employee relations and publication of the Pentagon Papers may have affected morale in the armed forces. Neither justified a prior restraint on speech or assembly. Almost every lawsuit against a corporation is negative publicity but negative publicity can

never justify a prior blanket restraint on speech or publicity by the parties and their counsel in a civil matter.

Article III courts are open to the public and any restriction on publicity, especially in a civil case, should be as narrowly tailored as is judicially possible, with the court explaining the need for each aspect of the restraint. Article III courts were created to protect First Amendment rights, not violate them.

C. Local Rule 4.04(e) and its Most Recent Application by the Eleventh Circuit Conflicts with Decisions of the United States Courts of Appeals for the Sixth and Eighth Circuits

In addition to the Fifth and the Eleventh Circuits, the United States Court of Appeals for the Sixth Circuit has ruled upon orders restricting communications with prospective class members. The Sixth Circuit in *Williams v. United States District Court*, 658 F.2d 430 (6th Cir. 1981), *cert. denied*, 454 U.S. 1128 (1981), following the Supreme Court's ruling in *Gulf Oil Co. v. Bernard*, issued a writ of mandamus directing the district court below to vacate an order restricting communications between parties and their counsel issued pursuant to a local district court rule. In *Williams v. United States District Court*, a case involving a race discrimination class action suit, the Sixth Circuit stated:

> A district court's rule-making authority is derived from Fed.R.Civ.Pro. 83 and 28 U.S.C. § 2071. Rule 83 and Section 2071 prohibit a district court from issuing local rules which are inconsistent with the Federal Rules of Civil Procedure, Acts of Congress and rules of practice and procedure prescribed by the

> Supreme Court. A local rule is inconsistent with federal rules and statutes of it alters those aspects of the litigation, thereby frustrating federal policies. *Colgrove v. Battin*, 413 U.S. 149, 163- 64 and n. 23, 93 S.Ct. 2448, 2456, and n. 23, 37 L.Ed.2d 522 (1973); *Miner v. Atlass*, 363 U.S. 641, 649- 50, 80 S.Ct. 1300, 1305, 4 L.Ed.2d 1462 (1960). (footnotes omitted)

Williams, at 435-36.

The United States Court of Appeals for the Eighth Circuit in *McKenna v. Champion International Corp.*, 747 F.2d 1211 (8th Cir. 1984), an age discrimination class action, held that the district court improperly ordered prospective class members to be notified of their right to join in the action. In *McKenna*, the appellate court tested the federal administrative ADEA rule, section 216(b) and reasoned:

> A notice prepared and sent by an attorney to prospective class members serves primarily to procure remunerative employment. Accordingly, we analyze the attorney's right to send the notice as commercial speech. A four-part test is applied: first, is the communication misleading or does it concern unlawful activity; second, if there a substantial interest in prohibiting the speech; third, does prohibition directly advance these interests; and fourth, is the regulation no broader than necessary to further the asserted interests. (citations omitted)

Id., at 1214-15.

The *McKenna* court likened notices being sent to prospective class members as a "direct-mail solicitation of particular plaintiffs for a particular lawsuit closely approach[ing] in-person solicitation. *See Baker v. Michie Co.*, 93 F.R.D. 494, 496 (W.D.Va.1982)." *Id.* at 1216. However, in his concurring opinion, Judge McMillian, wrote: "This court's holding is specifically directed to plaintiff's counsel, and the analysis focuses upon the danger that counsel's sending notice to potential class members would constitute improper solicitation. However, I do not read the court's opinion to prohibit the plaintiff...from communicating with other potential members of the class." *Id.* at 1217. *Cf. Hoffmann-La Roche Inc. v. Sperling*, 493 U.S. 165, 169 (1989) ("We hold that district courts have discretion, in appropriate cases, to implement 29 U.S.C. § 216(b) (1982 ed.), as incorporated by 29 U.S.C. § 626(b) (1982 ed.), in ADEA actions by facilitating notice to potential plaintiffs.").

Each of the four appellate decisions of the various circuits, as well the Court in *Bernard*, have analyzed the impact of the restraint on the ongoing litigation. A blanket prohibition on communication without any analysis by the district court violates both the First Amendment and the mandate of the Court in *Bernard*.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Robert J. Winicki
(Counsel of Record)
Winicki Law Firm
11265 Alumni Way
Suite 201
Jacksonville, Fl. 32246
(904) 564-9955

Barbara Slott Pegg
Barbara Slott Pegg, P.A.
13000 Sawgrass Village Circle
Suite 11
Ponte Vedra Beach, Fl. 32082
(904) 285-8100

Attorneys for Petitioners
Carmen Perillo, Stephen Dautel, Gerald Hardy, William Brown, J. Elaine Broom and Joann Kotchkowski.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-03252

IN RE:

CARMEN PERILLO; STEPHEN DAUTEL; ET AL.,

Petitioners,

On Petition for Writ of Prohibition to the United States District Court for the Middle District of Florida

BEFORE: ANDERSON and DUBINA, Circuit Judges.

BY THE COURT:

Petitioners' petition for writ of prohibition is DENIED.

FILED U.S. COURT OF APPEALS ELEVENTH CIRCUIT
SEP 22 1998
THOMAS K. KAHN CLERK

Appendix A

UNITED STATES DISTICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

CARMEN PERILLO, *et al., etc.*,

Plaintiffs

v. Case No.: 98-593-Civ-J-20A

AT&T Corp.,

Defendant.

ORDER

Plaintiffs' Motion to Declare Local Rule 4.04(e) in Facial Violation of the Right to Speech and Assembly and Right to Access to Courts (Doc. No. 4, filed June 29, 1998) is **DENIED**, without prejudice to Plaintiffs' right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification.

DONE AND ORDERED at Jacksonville, Florida this 11th day of August, 1998.

/s/
HARVEY E. SCHLESINGER
United States District Judge

FILED 98 AUG 12, CLERK, UNITED STATES DISTRICT COURT MIDDLE DISTRICT OF FLORIDA JACKSONVILLE FLORIDA

Copies to: Barbara Slott Pegg, Esq., Robert J. Winicki, Esq., Scott S. Cairns, Esq., Marcia Morales Howard, Esq., Law Clerk

Appendix B

Supreme Court, U.S.
FILED
FEB 22 1999
CLERK

No. 98-990

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

CARMEN PERILLO, STEPHEN DAUTEL, GERALD HARDY, WILLIAM BROWN, J. ELAINE BROOM, and JOANA KOTCHOWSKI,
Petitioners,

v.

AT&T CORP.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

LAURA A. KASTER
DAVID L. FORBES
AT&T CORP.
150 Allen Road
Liberty Corner, NJ 07938
(908) 603-6467

JOSEPH R. GUERRA *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

CHARLES C. JACKSON
JOHN T. MURRAY
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe
Suite 4200
Chicago, IL 60603
(312) 346-8000

Attorneys for Respondent

* Counsel of Record

February 22, 1999

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

2-PP

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent states the following:

AT&T Corp. ("AT&T") states that it is a telecommunications carrier providing both interstate and intrastate services. AT&T has no parent company. American Mobile Satellite Corp., Comverse Technology, Inc., Lanser Wireless Inc., and Luxenberg Exchange are nonwholly owned subsidiaries of AT&T.

TABLE OF AUTHORITIES

CASES

	Page
Bernard v. *Gulf Oil Co.*, 619 F.2d 459 (5th Cir. 1980)	4, 5, 8
Gulf Oil Co. v. *Bernard*, 452 U.S. 89 (1981)	2, 4, 5, 8
Hoffman-La Roche, Inc. v. *Sperling*, 493 U.S. 165 (1989)	6, 9
Hughes Aircraft Co. v. *Jacobson*, 67 USLW 4122 (Jan. 25, 1999)	2
Jackson v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999 (11th Cir. 1997)	6, 7
McKenna v. *Champion Int'l Corp.*, 747 F.2d 1211 (8th Cir. 1984), *overruled on other grounds*, 493 U.S. 165 (1989)	7, 8, 9
Shapero v. *Kentucky Bar Ass'n*, 486 U.S. 466 (1988)	9
Williams v. *United States District Court*, 658 F.2d 430 (6th Cir. 1981)	7
Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985)	9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-990

CARMEN PERILLO, STEPHEN DAUTEL, GERALD HARDY, WILLIAM BROWN, J. ELAINE BROOM, and JOANA KOTCHOWSKI,

Petitioners,

v.

AT&T CORP.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

The petition for a writ of certiorari should be denied because the decision below does not present the constitutional question petitioners are asking this Court to decide. In its one-sentence unpublished ruling below, the Eleventh Circuit did not construe Local Rule 4.04(e) of the United States District Court for the Middle District of Florida nor did it address the constitutionality of that rule. Rather, by denying an interlocutory writ of prohibition, the Eleventh Circuit concluded at most only that petitioners had not met the stringent standards governing issuance of such writs. That determination neither conflicts with the decisions of any other court, nor forecloses review of the constitutional question petitioners seek to raise following entry of a final, appealable order. There

is simply no merit to petitioners' claim that this Court should decide that constitutional question now. There is a complete absence of any factual record or analysis by the courts below, and the problems petitioners allege can and should be raised in the district court in the first instance. Indeed, although petitioners rely upon this Court's decision in *Gulf Oil Co.* v. *Bernard,* 452 U.S. 89 (1981), that case underscores the premature nature of the petition and confirms the impropriety of the review petitioners seek.

1. Petitioners were employees of two companies, AT&T Solutions Customer Care, Inc. and AT&T Universal Card Services, Inc. Both of these companies were owned by respondent, AT&T Corp. ("AT&T"). After AT&T had committed to divesting itself of these companies, but prior to the actual divestiture, AT&T offered a Voluntary Retirement Incentive Program ("VRIP") to certain AT&T employees in order to reduce its workforce. AT&T decided, in its capacity as a plan settlor, not to extend the VRIP to employees of those subsidiaries which it had already decided to divest. See *Hughes Aircraft Co.* v. *Jacobson,* 67 U.S.L.W. 4122, 4125 (Jan. 25, 1999) (plan settlor may decide "who is entitled to receive plan benefits and in what amounts"). On June 16, 1998, petitioners filed a class action complaint against AT&T in the United States District Court for the Middle District of Florida alleging that decisions AT&T made in connection with the VRIP violated plaintiffs' rights under the Employee Retirement Income Security Act ("ERISA").

Two weeks after filing their complaint, petitioners filed a nine-page "Motion to Declare Local Rule 4.04(e) in Facial Violation of the Right to Speech and Assembly."[1] Because they attacked the rule as facially invalid, petitioners submitted no sworn affidavits or other evidence

[1] For the Court's convenience, AT&T has reprinted petitioners' motion in the appendix to this opposition.

in support of their motion. Nor did they explain, in their unsworn, two-page discussion of the local rule's effects, how that rule impaired their ability to prosecute their ERISA claims. Rather, petitioners asserted that they and their counsel had been unable to attend a June 25, 1998 meeting held the week after "the price of AT&T stock fell by over twelve percent (12%)." App. at 2a-3a. Petitioners stated that "[m]any of the class members are substantial shareholders of AT&T [stock]," *id.* at 3a, but nowhere explained what relevance this meeting, or AT&T's share price, had on their ERISA claims. Similarly, petitioners claimed that Matrixx, the company that had purchased AT&T Solutions Customer Care, Inc., had communicated with former AT&T employees about "releasing their bridging rights under the Mandatory Portability Agreement" and had presented certain employees with a voluntary severance package that required "a release of all employment related claims against Matrixx." *Id.* at 3a-4a. Petitioners speculated that AT&T was somehow "intimately involved" in a severance package offered by this separate and wholly unaffiliated company, *id.* at 4a, but again nowhere explained what bearing any of these facts or speculation could possibly have on a lawsuit that does not include any claims under the entirely separate Mandatory Portability Agreement and to which Matrixx is not a party.

Relying on *Gulf Oil Co.* v. *Bernard*—a case in which this Court *declined* to address the constitutionality of an injunction against pre-certification class communications —petitioners argued that Local Rule 4.04(e) should be "declared unconstitutional." App. at 7a. Petitioners also claimed that the local rule violated their Due Process right to access the courts. *Id.* at 7a-8a. By order dated August 11, 1998, the district court denied petitioners' motion "without prejudice to [petitioners'] right to seek an exception to Local Rule 4.04(e) upon filing a motion for class certification." Pet. App. A.

Petitioners subsequently filed their motion for class certification but did not pursue the exception to Local Rule 4.04(e) that the district court had invited them to seek. Instead, they chose to petition the Eleventh Circuit Court of Appeals for a writ of prohibition directing the district court to declare Local Rule 4.04(e) unconstitutional. Pet. App. B. The court of appeals denied that petition in a single-sentence order dated September 22, 1998. Petitioners purport to seek review of the Eleventh Circuit's order.

2. Petitioners principally argue that the Eleventh Circuit's refusal to grant their petition for a writ of prohibition conflicts with this Court's decision in *Gulf Oil Co.* v. *Bernard*, 452 U.S. 89 (1981). This claim is wholly mistaken. Instead, *Gulf Oil* confirms the propriety of the Eleventh Circuit's decision.

In *Gulf Oil*, the defendants moved for and obtained an order from the district court prohibiting the named plaintiffs and their counsel from communicating with other putative class members. *Bernard* v. *Gulf Oil Co.*, 619 F.2d 459, 463-64 (5th Cir. 1980) (en banc). The plaintiffs then challenged the constitutionality of that order and submitted affidavits detailing the burdens the order placed on their ability to prosecute the class action. *Id.* at 464; see also 452 U.S. at 93-94. The district court rejected their arguments without making any factual findings, and entered a slightly modified order. 619 F.2d at 464. In stark contrast to petitioners here, the plaintiffs in *Gulf Oil* did not seek immediate and extraordinary appellate relief from this modified order. Instead, they moved in the district court for an exception to the order that would have permitted them to communicate with members of the proposed class. *Id.* After the district court denied that motion, the case proceeded to a resolution on the merits.

The *Gulf Oil* plaintiffs raised their constitutional challenge on appeal from a final order dismissing their case. See 452 U.S. at 97. A divided panel of the Fifth Circuit affirmed the district court's class communications order, but the Fifth Circuit reversed that ruling en banc. The en banc majority engaged in an extensive analysis of the constitutionality of the class communications order, including the extent to which the prohibited communications involved protected political speech rather than the commercial speech of attorneys. 619 F.2d at 466-78.

Despite the evidence the *Gulf Oil* plaintiffs submitted in the district court and the Fifth Circuit's detailed analysis of the underlying constitutional issues, this Court declined to address the constitutionality of the district court's order. Noting that class actions create "opportunities for abuse as well as problems for courts and counsel in the management of cases," this Court explained that "[f]ull consideration of the constitutional issue should await a case with a fully developed record." 452 U.S. at 100, 101 n.15. Accordingly, the Court disposed of the case on the non-constitutional ground that the order constituted an abuse of discretion under Federal Rule of Civil Procedure 23. *Id.* at 103.

This Court's disposition of the constitutional issue raised in *Gulf Oil* demonstrates the clear impropriety of the present petition. Petitioners ask this Court to decide the constitutionality of a local rule in a case in which (1) neither side submitted any evidence that would enable the Court to weigh the alleged burdens the rule imposes on class counsel against the risk of misleading or improper communications; (2) neither the district court nor the court of appeals construed the rule or discussed its constitutionality; and (3) the order under review does not even implicitly pass on the constitutional question petitioners seek to raise. As the Eleventh Circuit has explained, writs of prohibition are granted only in "extraordinary cases . . . when the right to such relief is clear and indisputable," and "are not to be used as a substitute

for appeal." *Jackson* v. *Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997). It is thus apparent that the Eleventh Circuit's refusal to grant such a writ here reflects nothing more than a judgment that the constitutionality of Local Rule 4.04(e) is too substantial an issue to decide on an interlocutory basis without the benefit of any factual record.

Moreover, petitioners seek review of this decision based on alleged harms that they failed to assert—let alone support with actual evidence—when they filed their motion for class certification in August 1998. A motion for relief from the local rule would have allowed the district court to explore matters such as how an alleged release of Matrixx, a non-party, could possibly affect putative class members in litigation with AT&T, and what harms the rule has inflicted on putative class members who are fully aware of the lawsuit yet chose not to join the action.[2] The numerous facts bearing on these issues, however, cannot be developed in this Court in the first instance. And a petition for a writ of certiorari is not an alternative to a remedy available in the lower courts.

3. Nor have petitioners identified any factors justifying their extraordinary request that this Court decide a constitutional question without the benefit of any lower court analysis or factual record. The decision below does not conflict with any other decision, and petitioners' attempts to show otherwise serve only to demonstrate the non-recurring nature of the issue they seek to present. In

---

[2] In *Hoffman-La Roche, Inc.* v. *Sperling*, 493 U.S. 165 (1989), the Court explained that the benefits of the analogous collective action under the Age Discrimination in Employment Act depend on putative members receiving "notice concerning the pendency of the collective action, so that they can make informed decisions about whether to participate." *Id.* at 170. Putative members who have helped to finance this action but not joined it, however, obviously have notice that the action is pending and have already made a decision about whether to participate in pre-certification proceedings.

fact, the only case petitioners cite that has actually addressed the constitutionality of a class communications order since *Gulf Oil* upheld the restriction as a legitimate restraint of commercial speech.

a. None of the three decisions petitioners cite conflicts in any way with the Eleventh Circuit's refusal to issue a writ of prohibition in this case. In two of those cases, the courts *invalidated* orders that *permitted* class communications prior to class certification. See *Jackson*, 130 F.3d at 1004; *McKenna* v. *Champion Int'l Corp.*, 747 F.2d 1211, 1217 (8th Cir. 1984). In the third case, the Sixth Circuit declined to decide the constitutionality of a local rule that was essentially the same as Local Rule 4.04(e), and instead decided only that the district court had exceeded its rulemaking authority in issuing the rule in question. *Williams* v. *United States District Court*, 658 F.2d 430, 434-35 (6th Cir. 1981).

Indeed, in the end, petitioners do not argue that the *decision below* conflicts with the decision of any other court. They argue instead that Local Rule 4.04(e) itself and the Eleventh Circuit's decision in a different case (*i.e.*, *Jackson*) conflict with the Sixth Circuit's decision in *Williams*. See Pet. at 18. This Court, however, does not issue writs of certiorari to resolve conflicts between local rules and the decisions of other courts, or to resolve conflicts arising out of decisions other than the decision under review. In any case, there is no "conflict" on the constitutional question the petition poses, because the Sixth Circuit did not reach that question in *Williams*.

b. While petitioners' survey of the caselaw fails to disclose any conflicts, it does demonstrate the insignificant impact of the question they ask this Court to resolve. Petitioners have cited no case decided in the last 15 years that has addressed the constitutionality of a class com-

munications order or rule.[3] This dearth of decisions demonstrates that the question petitioners ask this Court to decide is not a recurring or divisive one confusing the lower courts.

c. Finally, the Eighth Circuit's decision in *McKenna* belies petitioners' claim that Local Rule 4.04(e) is unconstitutional. In *Gulf Oil* itself, this Court acknowledged that there were "potential abuses associated with communications to class members," including "the heightened susceptibility of nonparty class members to solicitation amounting to barratry," the "increased opportunities of the parties or counsel to 'drum up' participation in the proceeding," and the "obvious potential for confusion and/or adverse[] [effects] on the administration of justice." 452 U.S. at 100 n.12 (internal quotation marks omitted). Citing these same concerns, the Eighth Circuit ruled in *McKenna* that the First Amendment permits courts to bar communications between class counsel and potential class members. *McKenna*, 747 F.2d at 1214-17. The Eighth Circuit explained that such communications "are not subject to third-party scrutiny and consequently are much more likely to approach (and occasionally cross) the dividing line between accurate representations and those that are false and misleading." *Id.* at 1216 (internal quotation marks omitted). On the other hand, in cases such as this one, where class counsel are private attorneys rather than public interest groups seeking to engage in litigation as a form of political expression, the attorney communications are "only 'marginally affected' with first amendment concern." *Id.* at 1216 (quoting *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 459 (1978)). Ac-

---

[3] By contrast, in *Gulf Oil*, the district court had modeled its order on a sample pretrial order in the *Manual for Complex Litigation*, "an important compilation of suggested procedures for handling complex federal cases," 452 U.S. at 93 n.4, that was "widely used by federal judges." 619 F.2d at 464. Thus, the order involved in *Gulf Oil* presented issues likely to recur in numerous class actions.

cordingly, the court concluded that, under the test developed for commercial speech, an outright prohibition on class communications is permissible, because the attorney conduct cannot be effectively regulated by less drastic means. *Id.* at 1217.[4] That decision is consistent with a number of this Court's subsequent rulings concerning regulation of attorney speech. See *Shapero* v. *Kentucky Bar Ass'n*, 486 U.S. 466, 475 (1988) (unique difficulties "would frustrate any attempt at state regulation of in-person solicitation short of an absolute ban because such solicitation is not visible or otherwise open to public scrutiny") (quotation marks omitted); *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 641 (1985) (same).

At a minimum, the Eighth Circuit's decision in *McKenna* confirms that the constitutionality of class communications orders should be decided only on a "full record" that enables the trial court—not the court of appeals or this Court in the first instance—to weigh the burden such orders place on plaintiffs against the risk of misleading or improper communications by class counsel. The constitutionality of a local rule designed to prevent misleading communications with putative class members plainly should not be assessed on review of an interlocutory order that does not address or decide the underlying constitutional question and that was rendered on a record devoid of any of the facts necessary to resolve that question.

---

[4] In *Hoffman-La Roche, Inc.*, this Court overturned the Eighth Circuit's conclusion that a district court "lacks the authority to direct notice to potential class members in suits brought under 29 U.S.C. § 626(b)." *McKenna*, 747 F.2d at 1214. This Court was careful to note, however, that it was not addressing "communications with potential plaintiffs by counsel . . . as these issues are not implicated in the case before us." 493 U.S. at 171 n.2. Thus, this Court in no way disturbed the Eighth Circuit's separate holding that "plaintiff's counsel should not be permitted to communicate with or send notices to prospective class members." 747 F.2d at 1217.

CONCLUSION

The petition should be denied.

Respectfully submitted,

LAURA A. KASTER
DAVID L. FORBES
AT&T CORP.
150 Allen Road
Liberty Corner, NJ 07938
(908) 603-6467

JOSEPH R. GUERRA *
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

CHARLES C. JACKSON
JOHN T. MURRAY
SEYFARTH, SHAW, FAIRWEATHER & GERALDSON
55 East Monroe
Suite 4200
Chicago, IL 60603
(312) 346-8000

Attorneys for Respondent

* Counsel of Record

February 22, 1999

APPENDIX

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

Case No: 98-593-Civ-J-16A

CARMEN PERILLO, STEPHEN DAUTEL, GERALD HARDY, WILLIAM BROWN, J. ELAINE BROOM, and JOANN KOTCHKOWSKI, on behalf of themselves and all others similarly situated,

Plaintiffs

v.

AT&T CORP.,

Defendant

PLAINTIFFS' EMERGENCY MOTION TO DECLARE LOCAL RULE 4.04(e) IN FACIAL VIOLATION OF THE RIGHT TO SPEECH AND ASSEMBLY AND RIGHT TO ACCESS TO COURTS

Plaintiffs, Carmen Perillo, Stephen Dautel, Gerald Hardy, William Brown, J. Elaine Broom, and JoAnn Kotchkowski, on behalf of themselves and all others similarly situated, move this Court to declare Local Rule 4.04(e) of the United States District Court for the Middle District of Florida in facial violation of the right to speech and assembly under the First Amendment of the United States Constitution and the right to access to courts under the Due Process Clause of the Fifth Amendment to the United States Constitution.

Background

Plaintiffs' counsel represent the above named six plaintiffs. In addition, they represent additional individuals

who were salaried management employees for a number of years of: (1) AT&T Solutions Customer Care, Inc., a subsidiary of AT&T Corp. ("AT&T"), prior to its acquisition by MATRIXX Marketing, Inc.; and (2) of AT&T Universal Card Services, Inc., a subsidiary of AT&T, prior to its acquisition by Citibank, N.A. Because of Local Rule 4.04(e), plaintiffs and their counsel has been prohibited from communicating with non-representative or non-named class members since June 19, 1998, the date this action was filed.

Many non-representative class members have made contributions to defray the legal costs of performing the necessary research prior to bringing this litigation. In addition, many have indicated that they desire to continue to financially support the litigation through contributions necessary to pay ongoing costs. However, for various reasons, a number of these individuals did not desire to be named plaintiffs. For example, some individuals were concerned that AT&T's counsel and private investigators would inquire into personal matters for which they had legitimate privacy concerns. Others were willing to contribute financially but were unsure whether they could devote the necessary time involved in serving as a named plaintiff and class representative. Still others thought that because the named plaintiffs were excellent representatives, they would prefer to remain in the background while continuing to contribute financially.

Prior to the filing of this lawsuit a number of meetings took place with the above individuals. The communications that occurred at these meetings were protected by the attorney/client privilege. However, after the filing of this lawsuit on Friday, June 19, 1998, neither plaintiffs' counsel nor the named plaintiffs could attend future meetings. A meeting was held on Thursday, June 25, 1998 and plaintiffs and their counsel could not attend to explain the developments of this past week. This meeting was a particularly crucial one because the price of AT&T stock fell by over twelve percent (12%) this past week

after the acquisition of TCI was announced last Monday in the Wall Street Journal. This decline resulted in a loss in the billions of dollars in the market value of AT&T stock. Many of the class members are substantial shareholders of AT&T.

Most important, Matrixx has been communicating with its managerial employees formerly employed with AT&T Solutions Customer Care about releasing their bridging rights under the Mandatory Portability Agreement and about a reduction in force. Plaintiffs and other management employees formerly employed with AT&T Solutions Customer Care have been presented with a proposal to waive their rights under the Mandatory Portability Agreement, which provides for mutual recognition of service credit and transfer of benefit obligations for certain employees who leave one "Interchange Company" and are later employed by another "Interchange Company." Interchange Companies include AT&T, the RBOCs (i.e. BellSouth) and Cincinnati Bell, Inc., the parent of Matrixx. The proposed release includes, in part, the following language:

> Any and all claims for benefits arising under the Employment Retirement Income Safety [Security] Act ("ERISA"), as amended from time to time, of any sort relating to portability of service with my former, current or future portability employer(s) [or Interchange Companies and certain of their subsidiaries].

Matrixx, has also presented members of plaintiffs' class with a voluntary severance package which requires, as a condition of acceptance, a release of all employment related claims against Matrixx. Curiously, the severance package terminates the employment of those managers who accept as of a date on or after the expiration of the bridging rights period. This means that a Matrixx employee who accepts will most probably be excluded from bridging for a five year period should he or she go to

work for another Interchange Company. If portability were also waived there appears to be no possibility of bridging. This has led to some suspicion that AT&T [1] is intimately involved in Matrixx's voluntary severance package, either through indemnity or as part of the recent sales agreement or both.

Despite all of these critical events affecting members of plaintiffs' class, including events with deadlines that may impact their rights under this lawsuit, the plaintiffs and their counsel cannot respond, advise or communicate with them.

Local Rule 4.04(e) prohibits ongoing communications with these individuals, including about the effect of this litigation on the above matters and requesting additional financial support. It provides as follows:

> In every case sought to be maintained by any party as a class action, all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member, not a formal party to the case, without approval by order of the Court. The communications forbidden by this rule include, but are not limited to, (1) solicitations directly or indirectly of legal representation of actual or potential class members who are not formal parties to the case; (2) solicitations of fees and expenses, or agreements to pay fees or expenses, from actual or potential class members who are not formal parties to the case; and (3) solicitations of request by

---

[1] In addition, AT&T mailed on or about the same date as the filing of this lawsuit an offer of a modified early retirement plan to certain former managers of AT&T who were denied the Armstrong Plan but who had bridging rights under the Mandatory Portability Agreement that is available to former employees of AT&T (and other participating companies including three of the plaintiffs' current employer, Matrixx) who were employed at the time of divestiture in 1983.

class members to opt out in class actions under Rule 23(b)(3), Fed. R. Civ. P.

Argument

Local Rule 4.04(e) is in facial violation of the First Amendment to the United States Constitution. *See Gulf Oil Co. v. Bernard,* 452 U.S. 89 (1981). In that case, the United States Supreme Court found an order prohibiting communication with class members to be an abuse of discretion and held:

> The order interfered with their efforts to inform potential class members of the existence of this lawsuit, and may have been particularly injurious—not only to respondents but to the class as a whole—because the employees at that time were being pressed to decide whether to accept a backpay offer from Gulf that required them to sign a full release of all liability for discriminatory acts. In addition, the order made it more difficult for respondents, as the class representatives, to obtain information about the merits of the case from the persons they sought to represent.
>
> Because of these potential problems, an order limiting communications between parties and potential class members should be based on a clear record and specific findings that reflect a weighing of the need for a limitation and the potential interference with the rights of the parties. Only such a determination can ensure that the court is furthering, rather than hindering, the policies embodied in the Federal Rules of Civil Procedure, especially Rule 23. In addition, such a weighing—identifying the potential abuses being addressed—should result in a carefully drawn order that limits speech as little as possible, consistent with the rights of the parties under the circumstances.

Id. at 101-02 (footnotes omitted)

Local Rule 4.04(e) presents a blanket prohibition on plaintiffs' rights to speech and assembly under the First Amendment. The Local Rule is not narrowly tailored. In addition, Local Rule 4.04(e) is a prior restraint that could be justified only under the most exceptional circumstances, none of which are present here. The combination of the blanket prohibition and the prior restraint makes Local Rule 4.04(e) an anachronism to the days of King George III. Such a federal governmental prior restraint on speech and assembly is exactly what Thomas Jefferson believed the First Amendment was designed to protect against. Article III courts are subject to the First Amendment.

In light of *Gulf Oil Co. v. Bernard*,[2] and the fact that the Local Rule is administrative in nature, if a Florida

---

[2] The Supreme Court affirmed the United States Court of Appeals for the Fifth Circuit's en banc judgment. Judge Godbold who wrote the majority en banc opinion, and who had dissented in the panel opinion, went further than the Supreme Court's affirming opinion and "held that the order was an unconstitutional prior restraint on expression accorded First Amendment protection." *Id.* at 98. *See Gulf Oil Co. v. Bernard*, 619 F.2d 459 (5th Cir. 1980) (en banc). The Supreme Court noted: "In holding that the order restricted protected speech, the court relied both on cases involving essentially political litigation. *NAACP v. Button*, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963);" *Gulf Oil Co.*, 452 U.S. at 99 n.9.

While the 1980 pre-split Fifth Circuit en banc opinion may not be binding on the Middle District of Florida because of the Supreme Court's affirmance of judgment, this Court should certainly consider the analysis and rationale contained in the en banc majority opinion. Even a cursory reading of this 1980 en banc majority opinion should have given the Middle District of Florida pause before it amended Local Rule 4.04 effective February 1, 1995. The district court's order held unconstitutional by the en banc Fifth Circuit contained language virtually identical to Local Rule 4.04(e). However, that order was less objectionable than Local Rule 4.04(e) because the district court order contained certain exceptions for attorney/client communications that are not present in Local Rule 4.04(e).

state circuit court chief judge had issued an identical administrative regulation, it would be doubtful that judge could claim qualified immunity to defend against a private remedial action filed in this Court under section 1983 of Title 42 of the United States Code. Local Rule 4.04(e) should be declared unconstitutional and put to rest in the same place where the pre-split United States Court of Appeals for the Fifth Circuit had previously sent virtually identical local rules in its 1980 en banc majority opinion in *Gulf Oil Co. v. Bernard,* 619 F.2d 459 (5th Cir. 1980) (en banc); *see* note 1, *supra.* Such local rules were not resurrected because the Supreme Court chose to affirm on non-constitutional grounds.

Local Rule 4.04(e) also violates the right to access to the courts under the Due Process Clause of the Fifth Amendment. The non-representative class members have a right to be heard and to notice as to the ongoings of litigation that may affect their interests. The United States Supreme Court in *Boddie v. Connecticut,* 401 U.S. 371, 375 (1971) explained:

> American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things.

> Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle.

Class members also have a right to communicate with plaintiffs and their counsel to learn the status of the litigation and obtain other information relevant to them. "Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard." *Id.* at 377. The only way class members can exercise their right to be heard is if they know what is going on in the litigation.

In addition, non-representative plaintiffs have the right to make contributions to defray the necessary costs of litigation that enable their dispute to be resolved. While governments may impose costs to litigants, they may not utilize those costs as a means to deprive litigants of their right to have their disputes resolved in a meaningful manner in the monopoly forum of an Article III court. A local rule that effectively prohibits contributions from non-representative plaintiffs in litigation that is certain to have thousands of dollars of costs runs directly afoul of the right to access. This is especially the case in this ERISA litigation where the Congress has preempted state law remedies and for the claim at issue provided for exclusive Article III federal court jurisdiction.

Conclusion

Local Rule 4.04(e) should be declared facially unconstitutional.

Certificate of Conference with Opposing Counsel

I certify that I conferred with Timothy L. Porter of AT&T's Legal Department concerning this motion. Mr. Porter responded that he had only recently become aware of the complaint and AT&T had not yet formulated any position on this motion.

Barbara Slott Pegg, P.A.

BARBARA SLOTT PEGG
Fla. Bar No. 275352
13000 Sawgrass Village Circle,
Suite 11
Ponte Vedra Beach, Fl. 32082
(904) 285-8100
Fax (904) 285-8890

WINICKI LAW FIRM

/s/ Robert J. Winicki
ROBERT J. WINICKI
Fl. Bar No. 335381
11265 Alumni Way
Suite 201
Jacksonville, Fl. 32246
(904) 564-9955
Fax (904) 641-0760
Attorney for the Plaintiffs

[Certificate of Service Omitted]